

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

9 ALLEN CORY CAMPBELL,

10 Plaintiff,

11 v.

12 NANCY A. BERRYHILL,
13 Acting Commissioner of the
Social Security Administration,¹

14 Defendant.

CASE NO. 3:16-cv-05386-JRC

ORDER ON PLAINTIFF'S
CONTESTED MOTION FOR
ATTORNEY'S FEES, EXPENSES
AND COSTS PURSUANT TO THE
EQUAL ACCESS TO JUSTICE ACT

15
16 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
17 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
18 Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States
19 Magistrate Judge, Dkt. 4). This matter comes before the Court on plaintiff's contested
20

21
22 ¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security. Pursuant to Rule 25(d)
23 of the Federal Rules of Civil Procedure, Nancy A. Berryhill is substituted for Acting
24 Commissioner Carolyn W. Colvin as the defendant in this suit. No further action needs to be
taken, pursuant to the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. §
405(g).

1 motion for attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412
2 (hereinafter "EAJA"). *See* Dkts. 14, 15, 16.

3 Subsequent to plaintiff's success at obtaining a reversal of the decision of the
4 Social Security Administration, defendant Commissioner challenged plaintiff's request
5 for statutory attorney's fees on the grounds that the requested fees are unreasonable given
6 the circumstances of this case. *See* Response, Dkt. 15, p. 2 (citing 28 § U.S.C. 2412(b)).

7 After considering and reviewing the record, including plaintiff's Motion for
8 Attorney Fees and Costs under EAJA, and the attached time and expense sheet (*see* Dkt.
9 14, pp. 2-3), as well as the excellent results obtained by plaintiff's counsel, the Court
10 concludes that plaintiff's fee request is reasonable.

11 Therefore, plaintiff's motion for fees, costs and expenses is granted pursuant to 28
12 U.S.C. § 1920 and the EAJA in the amount of \$7,475.98 (\$6,743.80 for the original
13 request, and \$732.18 for fees representing 3.8 hours replying to defendant's challenge to
14 the requested fees (at \$192.68/hour)) in attorney's fees, \$10.68 for expenses and \$400 for
15 costs.
16

17 BACKGROUND and PROCEDURAL HISTORY

18 On December 19, 2016 this Court issued an Order reversing and remanding this
19 matter for further consideration by the Administration (*see* Dkt. 12). The Court found that
20 the ALJ only made a "passing reference to plaintiff's work as 'not comparable to those of
21 an unimpaired individual,'" and hence, "the Court [could not] adequately determine
22 whether the ALJ properly evaluated plaintiff's self-employment at step one" (*see id.*, p.
23

1 2). This matter was reversed pursuant to sentence four of 42 U.S.C. § 405(g) for further
2 consideration due to this harmful error (*see id.*, pp. 12-13).

3 Subsequently, plaintiff filed a motion for EAJA attorney's fees, to which
4 defendant objected (*see* Dkt. 14). Defendant contends that the 35 hours requested are
5 unreasonable (Dkt. 15, p. 4). Plaintiff filed a reply (*see* Dkt. 16).

6 STANDARD OF REVIEW

7 In any action brought by or against the United States, the EAJA requires that "a
8 court shall award to a prevailing party other than the United States fees and other
9 expenses unless the court finds that the position of the United States was
10 substantially justified or that special circumstances make an award unjust." 28 U.S.C. §
11 2412(d)(1)(A).
12

13 According to the United States Supreme Court, "the fee applicant bears the burden
14 of establishing entitlement to an award and documenting the appropriate hours
15 expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The government has the
16 burden of proving that its positions overall were substantially justified. *Hardisty v.*
17 *Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010), *cert. denied*, 179 L.Ed.2d 1215, 2011
18 U.S. LEXIS 3726 (U.S. 2011) (citing *Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir.
19 1995)). Further, if the government disputes the reasonableness of the fee, then it also
20 "has a burden of rebuttal that requires submission of evidence to the district court
21 challenging the accuracy and reasonableness of the hours charged or the facts asserted by
22 the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392,
23 1397-98 (9th Cir. 1992) (citations omitted). The Court has an independent duty to review
24

1 the submitted itemized log of hours to determine the reasonableness of hours requested in
2 each case. *See Hensley, supra*, 461 U.S. at 433, 436-37.

3 DISCUSSION

4 In this matter, plaintiff clearly was the prevailing party because he received a
5 remand of the matter to the Administration for further consideration (*see* Order on
6 Complaint, Dkt. 12). In order to award a prevailing plaintiff attorney fees, the EAJA also
7 requires a finding that the position of the United States was not substantially justified. 28
8 U.S.C. § 2412(d)(1)(B). Defendant explicitly conceded that the government's position
9 was not substantially justified, and defendant argues that plaintiff's recovery for
10 attorney's fees should be reduced, not eliminated (*see* Defendant's Response to Plaintiff's
11 EAJA Motion for Fees, Dkt. 14, p. 2).

13 The Court agrees with defendant's concession (*see id.*). This conclusion is based
14 on a review of the relevant record, including the government's administrative and
15 litigation positions regarding the step one evaluation. For these reasons, and based on a
16 review of the relevant record, the Court concludes that the government's position in this
17 matter as a whole was not substantially justified. *See Guitierrez v. Barnhart*, 274 F.3d
18 1255, 1258-59 (9th Cir. 2001) (citations omitted).

19 The undersigned also concludes that no special circumstances make an award of
20 attorney fees unjust. *See* 28 U.S.C. § 2412(d)(1)(A). Therefore, all that remains is to
21 determine the amount of a reasonable fee. *See* 28 U.S.C. § 2412(b); *Hensley, supra*, 461
22 U.S. at 433, 436-37; *see also Roberts v. Astrue*, 2011 U.S. Dist. LEXIS 80907 (W.D.
23 Wash. 2011), adopted by 2011 U.S. Dist. LEXIS 80913 (W.D. Wash. 2011).

1 Once the court determines that a plaintiff is entitled to a reasonable fee, “the
2 amount of the fee, of course, must be determined on the facts of each case.” *Hensley*,
3 *supra*, 461 U.S. at 429, 433 n.7. According to the U.S. Supreme Court, “the most useful
4 starting point for determining the amount of a reasonable fee is the number of hours
5 reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley*,
6 *supra*, 461 U.S. at 433.

7 Here, plaintiff prevailed on the single claim of whether or not the denial of his
8 social security application was based on substantial evidence in the record as a whole and
9 not based on harmful legal error. When the case involves a “common core of facts or will
10 be based on related legal theories the district court should focus on the
11 significance of the overall relief obtained by the plaintiff in relation to the hours
12 reasonably expended on the litigation.” *See Hensley, supra*, 461 U.S. at 435. The
13 Supreme Court concluded that where a plaintiff “has obtained excellent results, his
14 attorney should recover a fully compensatory fee.” *Id.*

15 Because the Court concludes based on a review of the relevant evidence that the
16 plaintiff here obtained excellent results, the Court will look to “the hours reasonably
17 expended on the litigation,” which, when combined with the reasonable hourly rate,
18 encompasses the lodestar. *See Hensley, supra*, 461 U.S. at 435. Other relevant factors
19 identified in *Johnson, supra*, 488 F.2d at 717-19 “usually are subsumed within the initial
20
21
22
23
24

1 calculation of hours reasonably expended at a reasonably hourly rate.”² *See Hensley*,
2 *supra*, 461 U.S. at 434 n.9 (other citation omitted); *see also Kerr v. Screen Extras Guild*,
3 *Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (adopting *Johnson* factors); *Stevens v. Safeway*,
4 2008 U.S. Dist. LEXIS 17119 at *40-*41 (C.D. Cal. 2008) (“A court employing th[e]
5 *Hensley* lodestar method of the hours reasonably expended multiplied by a reasonable
6 hourly rate] to determine the amount of an attorney’s fees award does not directly
7 consider the multi-factor test developed in *Johnson*, *supra*, 488 F.2d at 717-19, and *Kerr*,
8 *supra*, 526 F.2d at 69-70”); *but see Goodwin v. Astrue*, 2012 U.S. Dist. LEXIS 97651 at
9 *10-*12, *14-*20 (W.D. Wash. 2012) (applying *Johnson* factors), *adopted by* 2012 U.S.
10 Dist. LEXIS 97650 (W.D. Wash. 2012). However, the Court will discuss these factors to
11 the extent that they are helpful and relevant.
12

13 As defendant does not object to plaintiff’s request for reimbursement for costs or
14 expenses, and does not object to plaintiff’s requested hourly rate for his attorney’s fees
15 request, the gravamen of defendant’s contentions here concern “the number of hours
16
17

18 ² The *Johnson* factors are: (1) The time and labor involved; (2) the novelty and difficulty
19 of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the
20 preclusion of other employment by the attorney due to acceptance of the case; (5) the customary
21 fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the
22 circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation,
23 and ability of the attorneys; (10); the ‘undesirability’ of the case; (11) the nature and length of
24 the professional relationship with the client; and (12) awards in similar cases. *Johnson*, *supra*,
488 F.2d at 717-19) (citations omitted); *see also United States v. Guerette*, 2011 U.S. Dist.
LEXIS 21457 at *4-*5 (D. Hi 2011) (“factors one through five have been subsumed” in
the determination of a number of hours reasonably expended multiplied by a reasonable
rate); *but see City of Burlington v. Dague*, 505 U.S. 557 (1992) (rejecting factor 6 of contingent
nature of the fee).

1 reasonably expended on the litigation.” (see Dkt. 15, p. 2). See also *Hensley, supra*, 461
2 U.S. at 433.

3 Defendant first contends that plaintiff’s request for 2.5 hours of time for
4 “preparing file and administrative record,” drafting a summons and cover sheet,
5 preparing a certificate of electronic service; and reviewing a briefing schedule and
6 presumed scheduling of deadlines “should not be billed at an attorney rate, regardless of
7 who performs them.” Dkt. 15, p. 4 (citing *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10
8 (1989) (other citation omitted)). Plaintiff replies that his attorney “billed .2 hours each for
9 the tasks of preparing the certificate of electronic service and reviewing the briefing
10 schedule [and that] the time claimed for these tasks cannot be considered unreasonable
11 and defendant does not assert that these tasks were unnecessary.” Dkt. 16, p. 2. Plaintiff
12 furthermore contends that the “remaining 2.1 hours allocated to these tasks were divided
13 in .8 hours for drafting the complaint, summons and cover sheet and 1.3 hours for
14 preparing the file and administrative records.” *Id.* Plaintiff notes that defendant does not
15 assert that these tasks were unnecessary but instead argues that the time spent is
16 unreasonable. *Id.*

17
18 Plaintiff argues “that .8 hours for drafting the complaint, summons and civil cover
19 sheet are reasonable as the complaint requires accurate facts to support jurisdiction.” *Id.*
20 Plaintiff contends that the “attorney time spent is reasonable to track down those facts
21 and make sure that the complaint is accurate.” *Id.* Finally, plaintiff argues “that the 1.3
22 hours for preparing the file and administrative records is appropriate in this case,”
23 because “this case was procedurally complex, with two administrative hearings (and
24

1 resulting opinions), and Appeals Council remand, request by counsel below for the ALJ
2 to recuse himself, a request by counsel below for the case to be transferred to a different
3 ODAR office and allegations by counsel below of ALJ bias.” *Id.* at 2-3. Plaintiff
4 contends that all of “these issues required attorney time to sort out in organizing and
5 preparing this case so that an orderly and timely appeal [could] be conducted.” *Id.* at 3.

6 The Court finds plaintiff’s argument persuasive and concludes that the amount of
7 time spent on the delineated tasks is reasonable. It is entirely reasonable for plaintiff’s
8 attorney to have spent the specified amount of time on these tasks.

9 Next, defendant contends that plaintiff’s “billing is extensive for a routine
10 disability case that did not present novel or complex questions,” noting that only one
11 issue was argued in plaintiff’s opening brief involving step one of the sequential
12 evaluation process and substantial gainful activity. Dkt. 15, p. 4 (citing Dkt. 9).
13 Defendant contends that this issue “was neither novel nor complex.” *Id.*

14 Plaintiff replies that “this case was not routine.” Dkt. 16, p. 3. Plaintiff also argues
15 that the “attorney time was spent in multiple hours of exploring possible ALJ error in the
16 ALJ’s refusal to recuse himself (AR. 12-14, 249-50), refusal to transfer the case to a
17 different ODAR office (AR. 115-16, 148, 212-14), possible ALJ bias (AR. 12-14, 249-
18 50), and whether or not the ALJ’s refusal to allow witness testimony at the last
19 administrative hearing was error (AR. 122-25).” *Id.* Plaintiff also contends that his
20 attorney “is duty-bound to explore all possible avenues of appeal involving ALJ error
21 [and the] fact that these alternative avenues were ultimately not pursued (based on the
22 undersigned’s professional judgment) does not make the attorneys time unreasonable.”
23
24

1 The Court not only concludes that plaintiff's argument is persuasive, but also appreciates
2 the professional judgment applied in not pursuing arguments that are not likely to be
3 successful. The Court reviews all arguments presented by the parties, no matter how
4 persuasive, and punishing an attorney for exercising judgment and not arguing positions
5 that are unpersuasive does not serve judicial economy.

6 On this point, plaintiff furthermore asserts that his attorney "found the issues
7 involved be complex and involved analyzing vocational testimony in light of a complex
8 regulation that involves three tests which requires the ALJ to assess whether or not the
9 work actually performed by the claimant is comparable to that of either unimpaired or
10 impaired individuals," further noting that this "is a novel question for the undersigned
11 and one of first impression." *Id.* Plaintiff's attorney indicates that he "has been in practice
12 for 26 years and never encountered the same," further noting the "dearth of case law on
13 the subject that could provide guidance or explanation as to how the regulation should be
14 interpreted." *Id.* The Court concludes that both of these points are persuasive. The Court
15 also found that the question at issue in this case was novel, as it was the first time this
16 issue was presented to this Court. The Court agrees also regarding the dearth of case law.
17 The Court also notes plaintiff's argument that "the vocational testimony at first glance
18 seemed to provide relevant evidence for the appropriate inquiry, but when analyzed in
19 light of the applicable regulation, seems to be well-intentioned but responding to a
20 different question than asked by the ALJ." *Id.* (citing AR. 426-30). All of plaintiff's
21 arguments on this second contention by defendant are persuasive.
22
23
24

1 Finally, defendant contends that “plaintiff billed 19.8 hours of time for his opening
2 brief which totaled 6 pages; only three pages of which involved any arguments on the
3 issue presented.” Dkt. 15, p. 4 (citing Dkt. 9, pp. 2-5). Defendant argues that plaintiff’s
4 “request for 19.8 hours for EAJA fees involving [the] opening brief is unreasonable for a
5 routine disability case such as this one especially considering only three pages of
6 plaintiff’s opening brief involved the argument at step one.” *Id.*

7
8 In reply, plaintiff contends that “defendant confuses conciseness with shortness of
9 time.” Dkt. 16, p. 3. Plaintiff argues that the “concise nature of the opening brief is due to
10 a time-consuming process of narrowing the issues and arguments in such a way as to not
11 waste the Court’s (or opposing counsel’s) time.” *Id.* The Court agrees and likewise is
12 aware that writing a concise brief can take more time than writing a long brief, which, by
13 the way, the Court appreciates greatly.

14 Plaintiff furthermore notes that the Ninth Circuit has “noted that district courts
15 may consider the fact that ‘many district courts have noted that 20 to 40 hours as the
16 range most often requested and granted in Social Security cases’ in determining the
17 reasonableness of a specific EAJA fee request.” *Id.* (citing *Costa v. Commissioner of*
18 *Social Security Administration*, 690 F.3d 1132, 1136 (9th Cir. 2012)). Plaintiff argues
19 that the number of hours incurred by plaintiff’s attorney in this case, at 35, is “not
20 excessive, even for routine case.” *Id.* The Court agrees. The Court also finds that the
21 additional 3.8 hours requested by plaintiff for the attorney’s time incurred replying to
22 defendant’s challenge to the fee petition are reasonable.
23

1 Plaintiff's reply is persuasive. The Court notes that there is time incurred regularly
2 by attorneys in the preparation of briefs that is not reflected by an explicit argument in the
3 final draft of the brief. The Court likewise often reviews portions of records and
4 considers issues that are not indicated explicitly in the R&Rs or Orders issued by the
5 Court.

6 Defendant presents her argument in the context of the *Johnson* factors, suggesting
7 that they support the reductions of fees. *See* Dkt. 15, p. 3. The Court will briefly discuss
8 the *Johnson* factors.

9
10 Regarding time, labor and the experience of the attorney, the first and ninth factors
11 referenced regarding determining the amount of reasonable attorney's fees in *Johnson*,
12 488 F.2d at 717-19, *see supra*, n.2, and adopted by the Ninth Circuit in *Kerr*, plaintiff
13 was represented by Todd R. Renda, Esq., ("counselor Renda"), an attorney experienced
14 in Social Security matters. Counselor Renda indicated that time expended on this case
15 included, among other things, multiple communications with plaintiff; reviewing the
16 administration's decision, the administrative record, defendant's Answer and responsive
17 brief; preparing the complaint; researching case law and federal regulations; drafting the
18 opening brief and reply brief; reviewing notices and other case management tasks;
19 reviewing the Order and judgment; and, drafting the petition for costs and fees (*see*
20 plaintiff's Motion, Dkt. 14, pp. 2-3).

21
22 Regarding the novelty and difficulty of the questions involved and the skill
23 required in order to perform the legal service properly, the second and third factors
24 considered in *Johnson* and *Kerr*, *see also supra*, n.2, this case involved knowledge of

1 social security disability law as well as knowledge of the administrative appeal process
2 before the Social Security Administration. *See Johnson, supra*, 488 F.2d at 717-19; *see*
3 *also Kerr, supra*, 526 F.2d at 69-70. Therefore, specialized knowledge and skill were
4 required for the prosecution of this matter and plaintiff's counsel has the requisite
5 experience and knowledge and is deserving of the full EAJA hourly rate.

6 The fourth factor considered in *Johnson*, 488 F.2d at 717-19, *see supra*, n.2, and
7 adopted by the Ninth Circuit in *Kerr*, is the preclusion of other employment by the
8 attorney due to acceptance of the case. *See Johnson, supra*, 488 F.2d at 717-19, *see also*
9 *Kerr, supra*, 526 F.2d at 69-70. Although plaintiff's counsel could not work on other
10 cases while working on this matter, the extent to which plaintiff's attorney was precluded
11 from other work does not appear to be any greater in this particular matter than occurs
12 with the acceptance of any case.

13 Regarding the customary fee and awards in similar cases, the fifth and twelfth
14 *Johnson* and *Kerr* factors, the requested fee is not outside the range of the amount of
15 attorney's fees generally awarded in cases of this type. *See Johnson, supra*, 488 F.2d at
16 717-19, *see also Kerr, supra*, 526 F.2d at 69-70. In addition, defendant has not
17 challenged the hourly rate requested by plaintiff, which complies with the EAJA, of
18 \$192.68 (*see* Dkt. 14, p. 3). The rate is reasonable, given the skill and expertise of
19 counselor Renda.
20

21 Regarding whether the fee is fixed or contingent, and the time limitations imposed
22 by the client or the circumstances, the sixth and seventh *Johnson* and *Kerr* factors, these
23 factors here do not have much relevance to the determination of whether or not the
24

1 requested fee is reasonable. *See Johnson, supra*, 488 F.2d at 717-19, *see also Kerr, supra*,
2 526 F.2d at 69-70.

3 Regarding the eighth factor of the amount involved and the results obtained,
4 plaintiff here obtained excellent results and, hence, as noted previously, should obtain a
5 fully compensatory fee. *See Hensley, supra*, 461 U.S. at 435.

6 Regarding the tenth and eleventh factors, this case does not appear to have been
7 either desirable or undesirable, and the nature and length of the professional relationship
8 with the client also does not appear to be relevant to the determination of whether or not
9 the requested fee is reasonable.

10 Having considered the relevant factors from *Johnson* and *Kerr, see supra*, n.2, and
11 having reviewed the relevant record, including the attorney declaration and the time
12 itemization submitted by plaintiff's counsel in this matter, and having considered
13 defendant's arguments, the Court concludes that the amount of time incurred by
14 plaintiff's attorney in this matter and plaintiff's requested fee award are reasonable. *See*
15 *Hensley, supra*, 461 U.S. at 435. As plaintiff's attorney "has obtained excellent results,
16 his attorney should recover a fully compensatory fee." *Id.* Therefore, plaintiff's motion
17 should be granted.

18 Specifically, following a review of plaintiff's request, the Court finds reasonable
19 plaintiff's request for expenses in the amount of \$10.68, for costs in the amount of
20 \$400.00, and for attorney's fees in the amount of \$7,475.98, representing 38.8 hours of
21 work (35 hours receiving reversal, 3.8 hours replying to defendant's challenge to fees).
22
23
24

1 CONCLUSION

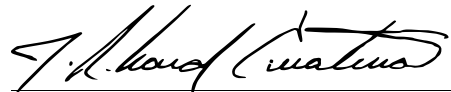
2 Plaintiff's request for \$400.00 in costs is granted pursuant to 28 U.S.C. § 1920.

3 Plaintiff's request for \$10.68 in expenses is granted pursuant to the Equal Access
4 to Justice Act, 28 U.S.C. § 2412 ("EAJA").

5 Plaintiff's motion for attorney's fees pursuant to EAJA in the amount of
6 \$7,475.98, representing 38.8 hours of work, is granted, pursuant to the EAJA and
7 consistent with *Astrue v. Ratliff*, 130 S. Ct. 2521, 2524 (2010).

8 Plaintiff's award is subject to any offset allowed pursuant to the Department of
9 Treasury's Offset Program. *See id.* at 2528. The check for EAJA fees and expenses, as
10 well as the check for costs, shall be mailed to plaintiff's counsel at Todd Renda, Esq.,
11 6314 19th St. West, Suite 21, Tacoma, WA 98466-6233.

12 Dated this 19th day of May, 2017.

13
14 

15 J. Richard Creatura
16 United States Magistrate Judge
17
18
19
20
21
22
23
24